JUDICIAL CONTROL OVER THE AMENDMENT OF STATE CONSTITUTIONS.[1]

In discussing the judicial attitude toward the amending process it may be well to devote brief attention to the question which has been frequently raised whether the proper adoption or rejection of an amendment is not a political question, and as such beyond judicial cognizance. In several cases courts have taken the view that they had no authority to interfere in such matters. This view is very well expressed by Judge Fisher's *dictum* in *Green* v. *Weller:*

"But he was of opinion, that an amendment of the Constitution having been submitted by the Legislature to the people, voted upon, and accepted by them, and by the succeeding Legislature inserted in the Constitution, as part of that instrument, there is no tribunal in the Government which can revise this action of the respective Legislatures, and of the people. * * * The question is not in its nature judicial, but purely political; and hence the action of that body to which the power has been specially confided, must be conclusive."[2]

In Maryland the constitution provides that "if it shall appear to the Governor that a majority of the votes cast * * * on said amendment or amendments, severally, were cast in favor thereof," the Governor should issue his proclamation declaring the amendment adopted. This language has been held by the Maryland court to vest in the Governor the final decision as to whether the people have adopted or rejected a proposed amendment. In the case of *Worman* v. *Hagan* the court said:

"And on his [the governor's] proclamation that a proposed amendment has received a majority of the votes cast, it becomes *eo instanti* a part of the constitution. There is no reference of the question to any other officer, or to any other department. It is committed to the Governor without qualification or reserve, and without appeal to any other authority. Most certainly no jurisdiction is conferred on this court to revise his decision."[3]

This decision, it should be pointed out, rests upon the definite language of the Maryland constitution, and related simply to the de-

[1]This article forms part of a book on The Revision and Amendment of State Constitutions, which will be issued in the near future by the Johns Hopkins Press.

[2]Green *v.* Weller (1856) 32 Miss. 650; 33 Miss. 735.

[3]Worman *v.* Hagan (1893) 78 Md. 152. See also Miles *v.* Bradford (1864) 22 Md. 170.

termination of the result of the popular vote.[4] The New Jersey constitution contains no language similar to that of Maryland, but the supreme court of New Jersey in a late case took the view that the canvass of votes upon a proposed amendment was beyond judicial cognizance. The court said:

"The legislature constituted the board of state canvassers the tribunal by which the result of the election should be ascertained, and vested in it the jurisdiction to determine whether any amendment or amendments proposed had been adopted, and gave to the certificate of the board such force and effect that upon filing the same the amendment or amendments so certified to have been adopted should be and become part of the constitution. * * * The concurrence of the board of state canvassers and the executive department of the government, in their respective official functions, place the subject beyond the cognizance of the judicial department of the government."[5]

The position of the New Jersey supreme court was almost immediately reversed by the court of errors and appeals,[6] and it is now the settled rule that, in the absence of specific and definite constitutional provisions which vest the final decision in some other officer or department, the judicial authority of the State extends over every step in the amendment process.[7] The principle here is the

[4]Worman *v.* Hagan was criticized by Judge Elliott in McConaughy *v.* Secretary of State (1909) 106 Minn. 392, where the view is taken that even though a power is expressly conferred by the constitution upon another department or officer, the courts would still retain their control. Judge Elliott said that the courts would not be deprived "of their inherent power to determine the legality of the actions of officers" unless such power is in terms denied by the constitution. But if a power is expressly granted to another department does this not exclude the courts? The courts, it would seem, have no "inherent powers" above the constitution, but derive all power from the constitution just as do other departments of government. The Oregon constitution contains a provision similar to that of Maryland, and would seem also to remove this question from judicial cognizance. The Connecticut and Minnesota constitutions provide that an amendment shall become part of the constitution "if it shall appear, in a manner to be provided by law" that a sufficient popular vote was cast in its favor, and here also this matter would seem to be beyond judicial control if Worman *v.* Hagan be considered an authority.

[5]Bott *v.* Secretary of State (1898) 62 N. J. Law 107, 130. See also 61 N. J. Law 163, and State *v.* Swift (1880) 69 Ind. 505, 524. For a similar view with reference to another matter see Dennett's Case (1851) 32 Me. 508.

[6]Bott *v.* Wurts (1897) 63 N. J. Law 289.

[7]It may be worth while to trace briefly the growth of judicial control over the amending process. In Luther *v.* Borden (1849) 7 How. 1, 39, Chief Justice Taney said: "Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made,

same as that which lies behind the judicial power to declare laws invalid; it may be stated thus: The constitution is the supreme law and the courts are the especial guardians of that law. Any act, whether it be of legislation, of executive power, or any step in the amending process, which in the opinion of the courts violates the constitution, may be rendered of no effect by the exercise of the judicial authority. The judicial control of the amending process has been discussed somewhat fully in three recent cases, in which the authorities are extensively reviewed.[8]

The Mississippi constitution provides that

"if it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration or amendment, then it shall be inserted by the next succeeding legislature as a part of this constitution."

It was argued with much plausibility that this language left the final decision as to popular adoption to the legislature.

"It was argued that the rules prescribed by the constitution 'are all for the guidance of the legislature, and from the very nature of the thing, the legislature must be the exclusive judge of all questions to be measured or determined by those rules. * * * This section of rules, not only of procedure but of final judgment as well, confides to the separate magistracy of the legislative de-

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the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." State *v.* McBride (1836) 4 Mo. 303 was the first case to assert the judicial power to inquire into the validity of proposed amendments, and here the amendment was upheld, as also in Green *v.* Weller (1856) 32 Miss. 650 and Dayton *v.* St. Paul (1876) 22 Min. 400. Miles *v.* Bradford (1864) 22 Md. 170 denied the power. See also Brittle *v.* People (1872) 2 Neb. 198, 214. Collier *v.* Frierson (1854) 24 Ala. 100 is the only case before 1880 in which an amendment was declared invalid because improperly adopted. Hardly more than a half dozen cases involving the proper adoption of proposed amendments arose before 1880; up to 1890 probably not more than twenty such cases had come before the courts. Since 1890 cases have frequently arisen and the courts have exercised an effective supervision over all steps in the amending process. For the expression of a view that the question here considered is political not judicial see remarks by Judge Charles S. Bradley in Report of the American Bar Association, 1883, p. 32.

[8]State *v.* Powell (1900) 77 Miss. 543; Bott *v.* Wurts (1899) 63 N. J. Law 289; McConaughy *v.* Secretary of State (1909) 106 Minn. 392. See also Koehler *v.* Hill (1883) 60 Ia. 543; Gabbert *v.* R. R. Co. (1902) 171 Mo. 84; Kadderly *v.* Portland (1903) 44 Or. 118; Knight *v.* Shelton (1905) 134 Fed. 423; Rice *v.* Palmer (1906) 78 Ark. 432; Miller *v.* Johnson (1892) 92 Ky. 589; McBee *v.* Brady (1909) 15 Ida. 76. The cases cited in the succeeding discussion proceed upon the assumption that courts have authority to enforce the constitutional provisions regarding the amending process, and many of them discuss this subject, but it is deemed unnecessary again to refer to such cases here, especially as they are exhaustively reviewed in the three cases cited above.

partment full power to hear, consider, and adjudge that question. The legislature puts the question to the qualified electors. The qualified electors answer back to the legislature: "If it shall appear" to the legislature that its question has been answered in the affirmative, the amendment is inserted and made a part of the constitution. The Governor and the courts have no authority to speak at any stage of this proceeding between the sovereign and the legislature, and when the matter is thus concluded it is closed, and the judiciary is as powerless to interfere as the executive.' But it was held that the question whether the proposition submitted to the voters constituted one, or more than one, amendment, whether the submission was according to the requirements of the constitution, and whether the proposition was in fact adopted, were all judicial, and not political, questions."[9]

The Mississippi court said:

"Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or non-compliance with the constitutional directions as to how such amendments shall be submitted and adopted; and whether such compliance has, in fact, been had, must, in the nature of the case, be a judicial question."

The amendment which had been inserted into the constitution by the legislature was declared invalid by the court.[10]

After an exhaustive review of the authorities Judge Elliott of the Minnesota supreme court stated the present rule as follows:

"The authorities are thus practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of an existing constitution is a judicial question. There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the constitution has been amended in the manner required by the constitution, unless a special tribunal has been created to determine the question; and even then many of the courts hold that the tribunal cannot be permitted to illegally amend the organic law. There is some authority for the view that when the constitution itself creates a special tribunal, and confides to it the exclusive power to canvass votes and declare the results, and makes the amendment a part of the constitution as a result of such declaration by proclamation or otherwise, the action of such tribunal is final and conclusive. It may be conceded that this is

[9]McConaughy *v.* Secretary of State *supra* at 407; State *v.* Powell *supra* at 551-2, 567.

[10]A Mississippi proposed amendment of 1902 which failed of adoption sought to amend the language quoted above so as to read "if it shall appear to the legislature." Language similar to that of the present Mississippi constitution will be found in the constitutions of Alabama, Kentucky, Maine, and Texas.

true when it clearly appears that such was the intention of the people when they adopted the constitution."[11]

It may be that the latter part of Judge Elliott's statement is too strong, but certain it is that with the courts there is a strong presumption against any construction of constitutional provisions which would deprive them of control over the amending procedure. It is assumed to be the duty of every court so to construe constitutions and laws as to give itself jurisdiction if possible and this rule may, when it seems necessary, be employed with reference to the amending process.

It may be said then that the courts exercise supervision over all steps of the amending process which are specified in the constitution of the State. Such supervision would ordinarily be somewhat easy as affects public acts which may be proven by external evidence, as, for example, the questions whether a proper journal entry was made, whether there was sufficient publication, whether a proposed amendment was properly submitted as merely one proposal, or whether the popular vote as canvassed showed a sufficient majority for the adoption of the proposal. But when the canvass itself is questioned and a recount of votes is asked, the question becomes a more difficult one, because involving the exercise of a function not ordinarily performed by courts. But the same principle applies, and in Michigan and Minnesota recounts have been had under judicial supervision.[12]

Assuming then that whether an amendment has been properly proposed or adopted is a judicial question, it will next be well to discuss the attitude of the courts in passing upon such questions. The proper rule would seem to be that stated by the Colorado court in *People* v. *Sours:*

"At the outset it should be stated that every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the constitution when it is attacked after its ratification by the people."[13]

This liberal attitude has usually been taken, although in some cases it has been laid down that the amending process being presumably more important than the ordinary legislative function should have

[11]McConaughy *v.* Secretary of State *supra* at 409.

[12]Rich *v.* Board of State Canvassers (1894) 100 Mich. 453; McConaughy *v.* Secretary of State *supra.*

[13](1903) 31 Colo. 369, 376, 388, 390. See also Edwards *v.* Lesueur (1896) 132 Mo. 410.

a stricter rule applied to it than to the passage of ordinary laws.[14] Judge Jameson advocated the policy of strict as opposed to liberal construction,[15] and the supreme court of Iowa has adopted the view that "where the existing constitution prescribes a method for its own amendment, an amendment thereto, to be valid, must be adopted in strict conformity to that method."[16] In Iowa where a proposed amendment is required to be entered on the journals of the two houses, the supreme court has declared invalid two important amendments which were not entered "in full" although full entry was not specifically required, and thus resolved against the amendments approved by the people the doubt as to the proper meaning of the constitutional requirement.[17] So too the Mississippi court in *State* v. *Powell* took a strict view as to what constitutes one or more than one amendment,[18] and the Indiana and Wyoming courts have taken a strict view with reference to ambiguous language in the constitutions of those States regarding the popular vote required, although the same language has been construed in a precisely opposite manner by the supreme court of Idaho.[19] So too cases in Nevada and California have taken a very strict view which subjects the amending process to control by ordinary legislation, and which if adhered to would greatly restrict the legislative power of proposing amendments.[20]

In discussing the strict or liberal interpretation of the amending clause, it should perhaps be said that the same court may at one time be liberal and at another strict. The function of passing upon the validity of laws or proposed amendments is primarily political, not judicial, and where the opinion of a court happens to be opposed to a proposal it is usually not difficult to find some reason for declaring such proposal invalid.[21] Some, at least, of the cases con-

[14]State *v.* Foraker (1889) 46 Ohio St. 677; State *v.* Powell (1900) 77 Miss. 543, 576; Bott *v.* Wurts (1899) 63 N. J. Law 289; State *v.* Rogers (1894) 56 N. J. Law 480, 619.

[15]Jameson, Constitutional Conventions (4th ed.) 617. See also J. W. Garner in 1 American Political Science Review 234.

[16]Koehler *v.* Hill (1883) 60 Ia. 543.

[17]Koehler *v.* Hill *supra;* State *v.* Brookhart (1901) 113 Ia. 250.

[18]State *v.* Powell *supra.*

[19]State *v.* Swift (1880) 69 Ind. 505; *In re* Denny (1901) 156 Ind. 104; State *ex rel.* Blair *v.* Brooks (1909) 17 Wyo. 344; Green *v.* State Board (1896) 5 Ida. 130.

[20]Hatch *v.* Stoneman (1885) 66 Cal. 633; State *v.* Davis (1888) 20 Nev. 220; Livermore *v.* Waite (1894) 102 Cal. 113.

[21]Where the constitutional requirements concerning amendment are numerous and specific, action by a great number of persons is usually necessary, and some flaw in the proceeding may usually be found if a care-

struing strictly the amending clause, may be explained upon this ground.

But, as has already been suggested, the judicial construction of the amending clause has usually been liberal, and has resolved doubts in favor of the validity of amendments approved by the people.[22] This liberal attitude is one with respect to the manner of compliance with constitutional requirements, but substantial compliance with the steps laid down in the constitution is required. If a required step is omitted, or is not even in substance complied with, no court has ever upheld the amendment, even though it may have been approved by the people. That is, the constitutional requirements are mandatory, not merely directory,[23] and no court will overlook the entire disregard of even the less important of such requirements. For example, the Alabama constitution of 1819 required proposal by the legislature, publication, a popular vote, and then a subsequent ratification by the legislature. Eight amendments were proposed by the legislature of 1844-45, and were approved by the people, but one of them was by inadvertence omitted in the subsequent ratifying vote of the legislature. The court held

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ful search is made. For example, where publication is required in each county of a State it may easily be that through accident or design publication might be improperly made in one or more counties, and if a court desired to be strict this might be held to invalidate the amendment. See Phohibitory Amendment Cases (1881) 24 Kan. 700; State *v.* Winnett (1907) 78 Neb. 379, 387; Lovett *v.* Ferguson (1897) 10 S. D. 44.

[22]This appears clearly in the cases sustaining expedients for avoiding the constitutional provisions requiring a majority of all persons voting. State *v.* Winnett (1907) 78 Neb. 379; State *v.* Laylin (1903) 69 Ohio St. 1; May and Thomas Hardware Co. *v.* Birmingham (1898) 123 Ala. 306.

[23]A note in 10 L. R. A. [N. S.] 149 suggests that the courts sometimes treat immaterial constitutional requirements as directory, but even the most liberal cases have ordinarily declined to go as far as this. There is, however, a *dictum* to this effect in Commonwealth *v.* Griest (1900) 196 Pa. St. 396, 416: "We think that the provision as to publication three months before the next general election, as prescribed in the first clause of article 18, should be regarded as merely a directory provision, where strict compliance with a time limit is not essential." In Holmberg *v.* Jones (1901) 7 Ida. 752, 758, 759, the court intimated, *obiter,* that though two-thirds of the members of each house did not vote for a proposed amendment, if the measure had been put on the ticket without objection and approved by the people, an estoppel would operate to prevent a contest of its validity after popular approval, although objection might have been made at an earlier stage of the proceedings. This view is doubted in the later case of McBee *v.* Brady (1909) 15 Ida. 761. For an argument that constitutional requirements with reference to amendment may be legally disregarded in case of necessity (that is, when amendments are urgently needed but the amending process operates with such difficulty as to be practically unworkable) see a pamphlet on Chicago and the Constitution, a report made to the Civic Federation of Chicago in 1902 by E. Allen Frost, Robert McMurdy, and Harry S. Mecartney, pp. 51-57. See also a similar suggestion in State *v.* Winnett (1907) 78 Neb. 379, 387.

that the proposed amendment which had not been ratified was not adopted, and said:

"We entertain no doubt, that, to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself, must be observed, and the omission of any one is fatal to the amendment."[24]

Similarly where the requirement of "full entry" on the legislative journals is not complied with,[25] or where an "entry" is required but no reference whatever is made to the proposed amendment in the legislative journals,[26] proposed amendments were held invalid even after approval by the people. Somewhat similar in character was the case of *State* v. *Tooker*,[27] where a proposed amendment was held invalid where it had been published for only two weeks although the state constitution expressly required publication for three months before the election. It is now so well recognized that a proposed amendment will not be upheld unless all constitutional steps are complied with, that it is customary, where some step has through inadvertence been omitted, for the executive officers not to take steps for the popular submission of such a proposal.[28]

But where an effort has been made to comply with the constitutional requirements, and where such compliance has not been complete, the question presents itself to the court whether immaterial errors should be permitted to defeat the popular will as expressed upon an amendment adopted by the people, and upon this question the courts have usually taken a liberal attitude. So in the Kansas *Prohibitory Amendment Cases*,[29] Judge Brewer remarked that "omissions and errors which work no wrong to substantial rights are to be disregarded," and said further that:

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[24]Collier *v.* Frierson (1854) 24 Ala. 100. See also State *v.* McBride (1836) 4 Mo. 303.

[25]Durfee *v.* Harper (1899) 22 Mont. 354.

[26]State *v.* Tufly (1887) 19 Nev. 391.

[27](1894) 15 Mont. 8. The court in this case refers to the fact that the constitutional provisions of Montana are expressly declared to be mandatory except when otherwise specified, but the requirements would, it seems, have been mandatory in any case.

[28]Commonwealth *v.* Griest (1900) 196 Pa. St. 396; State *ex rel. v.* Mason (1891) 43 La. Ann. 590. A Mississippi proposed amendment was not submitted to the people in 1908 because the Secretary of State negligently failed to publish it in conformity with the constitutional provisions. A Secretary of State or other ministerial officer may, of course, defeat a proposed amendment by neglecting to comply with the constitutional requirements. But the duty of such officers may be enforced by mandamus.

[29](1881) 24 Kan. 700, 710.

"The two important, vital elements in any constitutional amendment, are, the assent of two-thirds of the legislature, and a majority of a popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because, by them, certainty as to the essentials is secured. But they are not themselves the essentials."

This statement has frequently been quoted with approval. A somewhat similar view was later expressed by the supreme court of South Dakota:

"The action of the two houses and the will of the people, as expressed by their vote, should not be set aside or disregarded upon purely technical grounds when no material requirement of the constitution has been omitted, and where the proceedings taken clearly manifest the intention of those bodies and the people to amend the fundamental law."[30]

In the recent Colorado case of *People* v. *Sours*,[31] the court took a very liberal attitude, saying that legislative action must be in substantial compliance with the constitutional requirements, but that technical objections would be brushed aside. Here a number of specific objections were made to an amendment approved by the people, of which perhaps the most important was that the constitution required "full entry" of the proposed amendment upon the legislative journals, but that the entry upon the House journal did not agree with that on the Senate journal. The court sustained the amendment, and said that

"the disagreement between the journals is a mere clerical mistake, that the same bill in fact passed both houses, and that the entering by mistake upon the journal of the house of the half dozen words quoted does not violate the provision of the constitution requiring the proposal to be entered in full upon the journals of both houses."

The fact remains, however, that technically there was not a full entry of the proposed amendment on the journal of each house. In this case the Colorado court was also very liberal in its attitude regarding the requirement that each amendment shall be so submitted to the people that it may be voted upon separately.[32]

[30]Lovett *v.* Ferguson (1897) 10 S. D. 44; State *ex rel.* Adams *v.* Herried (1897) 10 S. D. 109.

[31](1903) 31 Colo. 369, 405. See also People *v.* Loomis (1904) 135 Mich. 556.

[32]As to the liberal attitude of courts see also Trustees of University of N. C. *v.* McIver (1875) 72 N. C. 76; Bray *v.* City Council of Florence (1901) 62 S. C. 57; Kadderly *v.* Portland (1903) 44 Or. 118; Farrell *v.* Port of Columbia (1907) 50 Or. 169, 175. In Kadderly *v.* Portland the constitutional provisions were construed strictly with reference to two proposed amendments which had failed of adoption in order to uphold

Even where an amendment may have been adopted without substantial compliance with the constitution, long acquiescence in such a change may place it beyond judicial cognizance—the question as to whether an amendment was properly put into effect may have become by lapse of time, a political as distinguished from a judicial question. An amendment to the Colorado constitution was adopted in 1884 extending the legislative sessions from forty to ninety days. In 1894 a case arose in which a law was attacked as invalid because passed more than forty days after the commencement of the legislative session, it being contended that the amendment of 1884 was invalid, and that therefore any legislation after a forty-day term was invalid; the Colorado constitution requires that a proposed amendment be entered in full on the journals of each house, but this requirement seems not to have been even substantially complied with, with reference to the amendment of 1884; the amendment was not correctly entered in full and the House and Senate entries did not agree. The court said that constitutional provisions are ordinarily mandatory, but that to overthrow this amendment would practically invalidate all laws passed by the five preceding legislatures, and that such action should not be taken because of the incorrect journal entries.[33] A somewhat similar case arose recently in Nebraska.[34] An amendment submitted to the people in 1886 lengthened the sessions of the legislature, and increased the compensation of members of the two houses. The legislature of 1887 canvassed the vote and declared the amendment lost because not receiving a majority of all votes cast. Shortly afterward, however, the legislature by a special act provided for a recount of

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an amendment which had actually been approved by the people; the decision, which may perhaps appear strict to the casual reader, was actually liberal in effect, and was intended to be so. Chase *v.* Board of Election Commissioners (1908) 151 Mich. 407, stretched the judicial power to its furthest point; the legislature of 1907 proposed an amendment and provided that it should be submitted to the people at the election of April, 1908, the constitution providing that proposed amendments should be submitted at "the next spring or autumn election" after their proposal, "as the legislature shall direct." The court held that this language referred only to general elections—the spring election in the odd years and the autumn election in even years—and declined to isue mandamus to compel submission in April, 1908. Under these conditions it would seem that the proposal would be entirely ineffective, but the court expressed the view that the proposal should without any further legislative action be submitted at the next regular election; the amendment was submitted to the people in November, 1908, and was adopted.

[33]Nesbit *v.* People (1894) 19 Colo. 441.

[34]Weston *v.* Ryan (1903) 70 Neb. 211.

votes, and upon the recount the amendment was declared adopted. It was contended that a special act for this purpose was invalid, and that therefore all proceedings under this act were inoperative, but the court held this not to be the case. The court said, in addition, that even if the legislative act were invalid the amendment should be sustained.

"It seems to us clear that the question of the adoption, and the consequent validity of this amendment, depends upon the number of votes it received, and that after sixteen years it is too much to ask us to set it aside, not on the ground of any actual lack of votes, but on the ground of irregularity, informality and impropriety in the manner in which the vote was counted and the result declared."

A question of a somewhat similar character arose in the Minnesota case of *Secombe* v. *Kittelson.*[35] Bonds had been issued under a constitutional amendment of 1858, and it was here sought to restrain the payment of interest on such bonds upon the ground that the amendment was invalid. The amendment was adopted after the constitution had been ratified by the people but before Minnesota was admitted to statehood, and it was contended that the constitution was not in force until admission, and could not therefore have been validly amended. The court said that the theory at the time was that the constitution became operative as soon as adopted, that the government organized under the constitution was a *de facto* government, that the amendment was ratified by the people and acted upon as valid, and that if this amendment were held invalid it would also be necessary to declare invalid all acts passed by the state legislature before the admission of the State into the Union. The court declined to inquire too technically into irregularities in the submission of an amendment which had been adopted and acted upon as the fundamental law, and said:

"We doubt whether a precedent can be found in the books for the right of a court to declare void a constitution, or amendment to a constitution, upon any such ground."

The question was held to be closed in this case because:

"*First.* Such irregularities, if any, must be regarded as healed by the subsequent act of Congress admitting Minnesota into the Union. * * * *Second.* They must be deemed cured by the recognition and ratification of this amendment, as a part of the constitution, by the State after its admission into the Union."

[35] (1882) 29 Minn. 555.

The ratification referred to was a later amendment which repealed the amendment of 1858, but expressly protected all rights acquired under that amendment.

Where an amendment essentially altering the operation or structure of a state government has been adopted and acted upon, the courts would probably in all cases treat the question of the validity of such an amendment as a political question not within judicial cognizance. The regular operations of government must not be interrupted, even though a constitutional alteration may have been improperly made, and the courts find it expedient to avoid the decision of such questions.[36] In *Koehler* v. *Hill*[37] it was said that

"it is competent for the courts, when the amendment does not relate to their own powers or functions, to inquire whether, in the adoption of the amendment, the provisions of the existing constitution have been observed."

It is difficult to see why the court should have thus distinguished between amendments affecting the courts and other amendments. It is true in fact, perhaps, that the validity of an amendment increasing judicial power would much more easily be sustained by the courts than one decreasing judicial power, but the courts having asserted their complete control over the amending process, such control exists irrespective of the subject to which the amendment may relate.

Several expressions in the cases discussed above would raise the inference that an amendment might be secure from judicial attack simply because it had been long acquiesced in and uncontested. This view can hardly be a proper one: in the cases above acquiescence was coupled with the fact that the amendments made essential changes in governmental organization, and such changes having been accomplished, were regarded as making the question a political one. But an amendment which did not make an essential change in the governmental organization—one the annuling of which would not disarrange the governmental machinery—may, it would seem, be attacked as invalid at any time, just as a law acted upon perhaps for years as valid, may be then

[36]Luther *v.* Borden (1849) 7 How. 140. See an approving reference to this case in Bott *v.* Wurts (1899) 63 N. J. Law 298, and in Koehler *v.* Hill (1883) 60 Ia 543.

[37](1883) 60 Ia. 543.

held unconstitutional by the court.[38] Mere lapse of time raises no presumption in favor of the validity of either a law or amendment, but long acquiescence without contesting its validity may be considered as having weight in determining the question of constitutionality.

A question of great interest is that as to the attitude of the Federal courts toward state constitutional amendments the validity of which may be assailed. This question has been raised in two cases in the inferior Federal courts. The case of *Smith* v. *Good*[39] was an action upon a promissory note given for the purchase of liquors in violation of a prohibition amendment adopted by Rhode Island in 1886. It was contended by the plaintiff that the amendment was not legally adopted because not voted upon by town meetings in several of the towns. The court said:

"When the political power of a state declares that an amendment to the constitution has been duly adopted, and the amendment has been acquiesced in by the people, and has never been adjudged illegal by the state court, the jurisdiction of a federal court to question the validity of such a change in the fundamental law of a state should clearly appear. * * * The very framework of the federal government presupposes that the states are to be the judges of their own laws; and it is not for the federal courts to interpose, unless some provision of the federal constitution has been violated. It is not pretended in this case that any federal question is raised."

The action of the state officers in declaring the amendment to be adopted was held to be conclusive, and the validity of the amendment was not inquired into.

A precisely opposite position was taken in the later case of *Knight* v. *Shelton*.[40] In this case a suit for damages was brought against election judges because of their refusal to receive a vote in the election of a member of the Federal House of Representa-

[38]Knight *v.* Shelton (1905) 134 Fed. 423 held invalid an Arkansas amendment of 1892.

[39](1888) 34 Fed. 204.

[40](1905) 134 Fed. 423. Knight *v.* Shelton and Smith *v.* Good are, of course, easily distinguishable on the ground that in the first case no Federal question was involved, while in Knight *v.* Shelton a Federal question was raised as to the right to vote for members of Congress. But whether the plaintiff had been improperly deprived of such right depended upon an amendment which had been acted upon by the State as valid for twelve years, and which had not been passed upon by the state courts. The validity of this amendment depended not upon Federal but upon state constitutional grounds. Federal courts have not assumed until recently to pass upon the validity of state enactments as tested by state constitutions.

tives, and the defendant set up an Arkansas constitutional amendment of 1892 which required the payment of a poll tax in order to qualify a voter. The validity of this amendment was denied, but it had been declared adopted by the proper state authorities, and had never been passed upon by the state court. The Federal court held that the amendment had not been adopted, because not approved by a "majority of the electors voting" at the election of 1892, as required by the state constitution.

In *Knight* v. *Shelton* the question was not raised as to the impropriety and possible inconvenience of a Federal court's passing upon the validity of a state constitutional amendment as tested by the requirements of the state constitution. It happens that the Arkansas court has in a later case taken a view similar to that taken by the Federal court,[41] but suppose it had taken a contrary view, and should insist upon treating as valid an amendment which the Federal court had declared invalid. We should then have the absurd situation of an amendment valid in the state courts and at the same time invalid in the Federal courts, unless the Federal courts should follow the state decision after it is rendered. The better rule would be, as stated in *Smith* v. *Good,* to leave the determination of such questions to the state courts, where no Federal constitutional question is involved, and for the Federal courts to follow the state decisions. However, the position taken in *Knight* v. *Shelton* is probably the one which will prevail, for it is in line with the recent attitude of the Federal courts in determining the constitutionality of state laws as tested by state constitutional principles, independently of state judicial action.[42]

Perhaps enough has been said to indicate the extent of judicial control over the amending process. It may now be worth while to inquire as to the manner in which such control is exercised. In most of the cases which have come before the courts, the validity of amendments has been denied in cases which have arisen after they have been submitted to the people and have been declared adopted, and it is, of course, always proper to attack an amendment in this manner. But the question has arisen several times as to the extent to which the courts may interfere and prevent the submission to the people of amendments which they consider to have been improperly proposed. It has already been said that the duties of executive officers with respect to publication and submis-

[41]Rice *v.* Palmer (1906) 78 Ark. 432.

[42]Prof. Henry Schofield in 3 Ill. L. Rev. 195.

sion are ministerial in character and may be enforced by mandamus.[43] These acts are necessary incidents to the amending process, and a mandamus in such cases is an aid to the amending process. But suppose, that upon the hearing for mandamus, the court should find that some essential requisite of a valid amendment had been omitted, may the court decline to issue the writ upon the ground that submission is improper because the amendment would be invalid even if approved by the people; that is, that the popular submission would in any case be ineffective? And, under similar circumstances, would it be proper for the courts to enjoin such submission? Under circumstances similar to those just referred to, the California supreme court has declined to issue mandamus to compel submission,[44] and in another case the court has actually restrained such submission.[45] In Missouri the court was asked to enjoin the submission of an amendment but declined to do so because it found no reason for taking such action, although its attitude seems to indicate that it considered an injunction to be proper should it have found the proposal defective. The court said:

"The power and jurisdiction of the judiciary to declare a proposal for an amendment to the constitution ineffectual, and to arrest its submission to the people, which we are now called upon to exercise, is coupled with far more serious responsibilities" than is the exercise of the power to annul a law.[46] To the same effect is a *dictum* in the Idaho case of *Holmberg* v. *Jones*,[47] where the court said:

"The only irregularity is the fact that it [the amendment] did not receive the votes of two-thirds of the members of the house. It cannot be questioned but that any voter of the state, by proper proceedings in the district court, or in this court, could have

[43]State *ex rel. v.* Mason (1891) 43 La. Ann. 590; Commonwealth *v.* Griest (1900) 196 Pa. St. 396; Warfield *v.* Vandiver (1905) 101 Md. 78.

[44]Hatch *v.* Stoneman (1885) 66 Cal. 632.

[45]Livermore *v.* Waite (1894) 102 Cal. 113. See also People *v.* Curry (1900) 130 Cal. 82.

[46]Edwards *v.* Lesueur (1896) 132 Mo. 410, 430. But the language quoted above should be read in connection with the following statement: "We have not discussed the question whether the remedy by injunction is, in any event, available for the purposes contemplated in this case, because defendant has expressly waived that question, and requested a decision on the broader grounds which we have accordingly considered." For the use of the injunction in connection with the amending process see also State *v.* Laylin (1903) 69 Ohio St. 1.

[47](1901) 7 Ida. 752, 758.

obtained a writ of prohibition restraining the Secretary of State from certifying the question of adopting such proposed amendment to the various county auditors. The official ballot could have been protected against the improper submission of such question, and could have been purged of the presence of such question thereon, by proper judicial proceeding."

The California rule has been expressly rejected in South Dakota and Colorado. In the South Dakota case of *State ex rel. Cranmer* v. *Thorson,*[48] it was sought to restrain the submission to the people of a proposed amendment, upon the ground that the constitutional requirements had not been complied with. The court declined to act and said:

"Power to amend the constitution belongs exclusively to the legislature and electors. It is legislation of the most important character. This court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution; but it cannot say what laws shall or shall not be enacted. It has the power, and it is its duty, whenever the question arises in the usual course of litigation, wherein the substantial rights of any actual litigant are involved, to decide whether any statute has been legally enacted, or whether any change in the constitution has been legally effected, but it will hardly be contended that it can interpose in any case to restrain the enactment of an unconstitutional law. * * * If they [the courts] cannot prevent the legislature from enacting unconstitutional laws, they cannot prevent it and the electors from making ineffectual efforts to amend the constitution."

In this case the court also said:

"It has not been shown, nor can it be imagined, in what manner the relator will be injured by the contemplated action of defendant. If the legislature has proceeded properly, and its proposed amendment shall be ratified by the people, the relator will have no legal cause of complaint, because, as a good citizen of the state, he will be bound to cheerfully accept the lawfully expressed will of a majority of its sovereign electors. If, on the other hand, the action of the legislature was such as to render any answer to the question [submitted to the voters] inoperative, the constitution will not be modified, and no one will be affected. Any additional burden which might result to relator, as a taxpayer, by reason of submitting this question at a general election, is too trifling, fanciful and speculative for serious consideration. * * * Having failed to show that he will be injured by the intended action of defendant, the relator is not entitled to have it enjoined, or its regularity investigated, in this action."

[48](1896) 9 S. D. 149.

In *People ex rel. O'Reilly* v. *Mills*,[49] it was sought to enjoin the Secretary of State of Colorado from publishing a proposed amendment as required by the constitution, before its submission to the people. In declining to issue an injunction the supreme court of Colorado said:

"In amending the constitution the voters become the body which finally give vitality to proposed amendments or refuse to make a change by rejecting them. The exercise of this power is as much a step in passing and considering proposed legislation of this character as any the general assembly must take in passing ordinary statute laws. The judicial department can no more interfere with such legislation or the successive steps necessary to be taken to amend the constitution than it can with the general assembly in the passage of other laws, because the judicial cannot directly interfere with the functions of the legislative department."

The principle announced by the Colorado and South Dakota courts may be stated as follows: The courts have no power to interrupt the process of amendment, before it is complete, to restrain a popular vote upon a constitutional proposal, even though they may be clearly of the opinion that the popular vote will be ineffective because of defects already apparent in the method of proposal. They must wait until the amending process is fully completed, and then pass upon the validity of the amendment if this question is properly presented in litigation before them. In accordance with this view it would seem that the courts should compel by mandamus administrative acts incident to the amending process; that is, the administrative acts should be treated as duties commanded by the constitution after the legislative proposal, which may be regarded as presumably valid and not subject to review in an *ex parte* proceeding. Under this view the courts may neither restrain the submission nor decline to compel it, because either of these is a direct interference with legislative action, the one positive in absolutely preventing submission, the other negative in that it does not enforce a purely ministerial duty in aid of the amending process.

Theoretically this view is the better one. The process of amendment is a process of superior legislation, and the courts ordinarily decline to interfere with the process of legislation, although they may always pass upon the validity of the completed product of such process. The question as to how far the courts

[49] (1902) 30 Colo. 262.

shall depart from this principle in controlling the amending process is particularly important in view of the introduction of the referendum on ordinary legislation. In Oregon, for example, a measure may be initiated by the people or by the legislature and then submitted to the people for approval. The submission of laws for popular approval in Oregon and in several other States makes such popular submission an integral step in the process of ordinary legislation. But the courts at present decline to interfere with the process of legislation, and wait until the validity of a law is attacked before them. What is likely to be the attitude of the courts with reference to laws (and constitutional amendments) enacted by a popular vote? In theory the courts should not interfere to prevent submission (even though the proposal be clearly defective and invalid), for this is a legislative act, and under the principle of the separation of powers the courts will not interfere with legislative acts. But heretofore it would have been necessary to interfere with the deliberations of a legislative body in order to restrain legislation, and such an action would be clearly indefensible. But with laws (and amendments) enacted after a referendum, there are several distinct steps in the legislative process, one of which, the act of submission, may be considered purely ministerial and may, in practice, be enjoined without interfering with the action of the ordinary legislative body of the State; that is, under a system of popular legislation it is easy for the courts, without seriously crippling a co-ordinate department of the government, to interfere and prevent a law's being enacted. This practical difference will probably incline the courts to take the view of the California court rather than that held in South Dakota and Colorado. So in the States which have adopted the referendum, it is probable that the courts will restrain the submission of a law if they consider the proposed law defective. For example, if an Oregon law were proposed by initiative petition, but did not comply with the constitutional requirement concerning its title, we may expect that the courts should restrain the submission of the proposal to the people, on the ground that it is invalid, and that the popular vote would in any case be ineffective. This rule would have the advantage of obtaining a judicial decision upon the validity of a law at the earliest possible moment, but it has the disadvantage of having such a question passed upon in an *ex parte* proceeding, and of extending still further the judicial control over

legislation. Yet, as has already been suggested, the judicial control over the processes of amendment and of popular legislation (by the referendum) will probably be established along the lines laid down by the California court.

In *Livermore* v. *Waite* submission was restrained because, in the opinion of the court, the proposed amendment was invalid in substance. Under this view it would seem that a court might restrain the submission of a referendum law or of a proposed amendment on the ground that it violated the "due process of law" or "equal protection of the laws" clauses of the Federal Constitution, or upon the ground that the proposal might for any other reason be invalid in substance. But such a judicial position would hardly be taken, and the courts, if restraining submission would probably do so, as a rule, only because of irregularities in the form or process of proposal.

The preceding discussion has related to the control of the courts over the form and process of amendment, and it will be well now to discuss the subject of judicial control over the substance and content of amendments. In the case of *Livermore* v. *Waite*[50] the supreme court of California restrained the submission of an amendment changing the seat of government to San José, on condition that a capitol site and one million dollars should be donated by the new seat of government, and providing that the Governor, Secretary of State, and Attorney-General should approve the site. In restraining the submission of this proposal the court said that the legislature had no authority to propose an amendment which did not become effective immediately upon its adoption by the people, without being dependent upon the will of other persons. This restriction upon the amending process was one discovered by the California court and was not based upon any provision of either state or Federal constitutions. In a precisely parallel case which arose in Missouri only two years after the California decision, the Missouri court took the opposite view that whether the amendment became effective immediately upon popular ratification was immaterial.[51] The California decision is indefensible; it cannot be justified and can be explained only upon the view that the court had determined to prevent the submission of the amendment for removing the capital, and could find no better reason to present

[50](1894) 102 Cal. 113.

[51]Edwards *v.* Lesueur (1896) 132 Mo. 410.

for its action. The California decision aside, it may be stated somewhat broadly that, except as tested by specific limitations in state and Federal constitutions, an amendment is not subject to judicial control as to its substance and content,—the courts have no right to determine what a constitution shall contain or the character of the amendments which may be enacted.[52] The Federal Constitution is, of course, superior to a state constitution, and any amendment conflicting with the Federal instrument is invalid. So too as to any specific limitations in state constitutions upon the subject matter of amendments. However, in the present state constitutions there are practically no restrictions[53] upon the character of proposed amendments, although such restrictions were more common in some of the earlier instruments, as in the Delaware constitution of 1776, the Arkansas constitution of 1836,[54] and the Mississippi constitution of 1868. Where, for example, a constitution expressly specified that its bill of rights should not be subject to amendment, such a restriction while unwise in policy, would properly be subject to enforcement by the courts.

"There can be no doubt that any amendment proposed in violation of these provisions would be declared by the courts to be void, for neither would the legislature have the power to propose nor the people to adopt them. To decide otherwise would be to hold that the legislature can constitutionally do an act expressly forbidden by the constitution; and that the people by an unauthorized vote, a vote recommended in violation of the constitution * * * can enact a valid constitutional amendment."[55]

It may be the constitutional difficulty might in certain cases have been evaded by first abrogating the restriction by an amendment, and then adopting the desired change. But, as has been suggested, the state constitutions now in force contain practically no such restrictions, and amendments are therefore subject to

[52]See also People *v.* Sours (1903) 31 Colo. 387-388; State *ex rel.* Cranmer *v.* Thorson (1896) 9 S. D. 149.

[53]Such restrictions as there are really do not limit the amending process to any material extent. In Alabama "representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendment." In Michigan the amending clause of the constitution cannot be changed by an amendment initiated by popular petition.

[54]State *v.* Cox (1848) 8 Ark. 436, overruled by Eason *v.* State (1851) 11 Ark. 482. See a discussion of these cases in Jameson, Constitutional Conventions (4th ed.) 581-586.

[55]Jameson, Constitutional Conventions (4th ed.) 581.

judicial control, as tested by the state constitutions, with respect to their method of enactment only and not with respect to their content and substance.[56]

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[56]See *dictum* in Louisiana Ry. and Navigation Co. *v.* Madere (1909) 124 La. 635. Judge Jameson suggests (Constitutional Conventions [4th ed.] 429-430) that where legislative details have been inserted into a constitution, the courts might treat this as an infringment upon the regular legislative functions and hold such provisions invalid because not fundamental in character. Judge Jameson expressed his view against any such position because "it would be in effect to permit our judiciary to annul the charters under which they act, under the pretext of striking from them provisions not properly fundamental," and Oberholtzer (Referendum in America, pp. 89-90) takes the same view. The position suggested by Judge Jameson, if assumed, would vest in the courts arbitrary and unregulated discretion to control the substance of both constitutions and statutes, for under it a constitutional provision might be declared invalid as not truly fundamental in character, and laws might be annulled because in the opinion of the court they contained provisions which should properly be inserted into the constitution. Such a doctrine has no chance of being accepted—it has nothing to be said in its favor, and the power of the courts has already been pushed as far as it is apt to be pushed at present. In this connection it is interesting to note that the Missouri court in the recent case of State *ex rel.* Johnson *v.* Chicago, Burlington and Quincy Railroad Company (1905) 195 Mo. 228, actually discussed the question as to whether a validly adopted state constitutional amendment might not be held invalid as in violation of the state constitution. The court, however, held the amendment invalid on specious Federal grounds. In People *v.* Sours (1903) 31 Colo. 369, 371, 391-394, the point was raised that a constitutional amendment must be an alteration of some existing provision of the constitution, and must not add entirely new matter to the constitution. The court properly declined to limit in this manner the legislative power to proposed amendments.

Since the above article was written the Supreme Court of Missouri has decided the case of State *ex rel.* Halliburton *v.* Roach (Mo., Aug. 1, 15, 1910) 130 S. W. 689. Here there was presented to the Secretary of State by initiative petition a proposed amendment dividing the State into senatorial districts; the Secretary of State declined to receive the petition, alleging that the proposed amendment was not properly of a character to be inserted into the constitution, and he was upheld by the State Supreme Court, which said: "The initiative and referendum amendment to the constitution speaks of laws and amendments of the constitution. Manifestly these terms are used in their plain and ordinary sense, and in our opinion the petitioners have no right to undertake to put in the constitution, which is regarded as the organic and permanent law of the State, mere legislative acts providing for the exercise of certain powers." The Supreme Court of Missouri thus establishes for itself absolute power to determine what provisions shall be inserted into the constitution of that State by means of the initiative petition, and the same principle would naturally apply to legislative proposals of amendment. Now since about 1870 our State constitutions have been largely made up of provisions not fundamental in character, and if the courts are to determine what provisions are properly constitutional, they in this way assume an absolutely uncontrolled discretion over the substance of all state constitutional provisions. But perhaps this case will not be considered a strong precedent, inasmuch as it seems to have been rendered necessary by political exigencies. The proposed redistricting amendment was a Republican measure. A majority of the court were Democrats.